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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1200

ROGER CRIST, as Warden of the Montana State Penitentiary, Deer Lodge, Montana, et al.,

Appellants,

v.

MERREL CLINE and L. R. BRETZ,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR APPELLEE L. R. BRETZ

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR APPELLEE L. R. BRETZ

OPINIONS BELOW

A. *Bretz v. Sheriff*, 539 P.2d 1191 (decided July 23, 1975) is the Montana Supreme Court decision denying appellees' original application for a writ of habeas corpus on double jeopardy grounds.

B. *Cline and Bretz v. Montana*, 406 F. Supp. 430 (decided December 31, 1975) is the Montana Federal District Court decision denying appellees' application for a writ of habeas corpus.

C. *State v. Cline, et al*, 555 P.2d 724 (decided October 10, 1976) is the Montana Supreme Court decision which on appeal

affirmed appellee Bretz's conviction. One of the errors claimed was denial of his objection that double jeopardy barred this trial. Appellee Cline's conviction was here reversed and dismissed which may affect his status here.

D. *Bretz v. Crist, et al,* 546 F.2d 1336 (9th Cir. 1976) (decided November 18, 1976) is the Court of Appeals decision reversing the Montana Federal District Court decision (B above) and which is now here on appeal to the United States Supreme Court.

JURISDICTION

The decision of the Court of Appeals for the Ninth Circuit was entered on November 18, 1976. Notice of appeal was filed on December 13, 1976 in the Circuit Court. This case was docketed and appellant's Jurisdictional Statement was filed on February 18, 1977.

Appellee Cline filed a motion to dismiss or affirm on March 21, 1977.

Appellee Bretz filed a motion to affirm on March 21, 1977.

This court granted review on April 25, 1977, ordering that:

> "Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits."

Appellant claims that jurisdiction rests upon United States Supreme Court Rules 13(2) and 15, (Jur. St. p. 1) and 28 U.S.C. 1254(2) (App. Br. p. 1).

Rule 40(1)(b) requires that appellant's brief on the merits contain a "concise statement of the grounds on which the jurisdiction of this court is invoked, with citation to the statutory provision and to the time factors upon which such jurisdiction rests". This also corresponds to the requirements of Rule 15(1)(b) as to the jurisdictional statement. Appellant's brief does not refer to this court's order granting review nor to its order postponing the jurisdictional question, as required. *Slagle v. Ohio,* 366 U.S. 259, 81 S. Ct. 1076 (1961), holds that where jurisdiction has been postponed to the merits, the brief should show "fully" the basis for

Supreme Court jurisdiction, or the appeal may be dismissed and appellant's brief does not do this.

As raised in appellee Cline's motion to dismiss or affirm, adopted by reference in appellee Bretz's motion to affirm, the third question raised as to manifest necessity does not involve a state statute held repugnant to the United States Constitution by the Court of Appeals. Accordingly, there is not jurisdiction under 28 U.S.C. 1254(2) which provides:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> * * *
>
> "(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented; . . . ."

Neither the jurisdictional statement nor Appellant's Brief contain the required citations as to authorities on this question of jurisdiction.

However, appellant's brief at page 14 abandons this third question on appeal involving manifest necessity so this should resolve this dispute.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment 5, Constitution of the United States, in part:

"... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;"

Art. III, Sec. 18, 1889 Montana Constitution, in part:

"... nor shall any person be twice put in jeopardy for the same offense."

Art. II, Sec. 25, 1972 Montana Constitution, in part:

"No person shall again be put in jeopardy for the same offense tried in any jurisdiction."

Sec. 95-1711(3), Revised Codes of Montana, 1947, in part:

". . . a prosecution based upon the same transaction as a former prosecution is barred by such former prosecution under the following circumstances:

* * *

"(d) The former prosecution was improperly terminated. Except as provided in this subsection, there is an improper termination of a prosecution if the termination is for reasons not amounting to an acquittal, and it takes place after the first witness is sworn but before verdict."

QUESTIONS AS PRESENTED BY APPELLANT

"1. Can Montana determine by statute that jeopardy attaches in a trial when the first witness is sworn, or must it conform to the Federal Procedural Rules which establish the swearing of the jury as the point at which jeopardy attaches?

2. Or, is Section 95-1711 of the Revised Codes of Montana, 1947, constitutional in light of the double jeopardy provisions of the Fifth Amendment to the United States Constitution?

3. Assuming that this Court were to hold that jeopardy attaches in state proceedings when the jury is sworn, does the doctrine of 'manifest necessity' nevertheless require that a trial be held?" (App. Br. p. 3).

ADOPTION OF CLINE BRIEF BY REFERENCE

Bretz here adopts by reference the brief for appellee Merrel Cline filed herein. Bretz will try to not unnecessarily repeat law and argument cited there.

STATEMENT

Bretz adopts the Statement set forth in appellee Cline's brief, and it should not be necessary to repeat the same here. However, it

should be noted that appellee Cline's brief was filed prior to the time the *amicus curiae* memorandum of the Solicitor General was filed. As noted below, there are numerous errors contained in the Solicitor General's statement. Bretz is well aware of these errors and the correct facts. However, the Supreme Court rules require that a statement of facts should be reflected by and decided through that part of the record that supports the same. As the Solicitor General's memorandum also states, the record here does not include the proceedings held in the state district court. Therefore, it is not here possible for Bretz to correctly set forth all of the facts as to the record below, with reference thereto, as the same are not now before this Court.

As also noted below, these facts are not in any event proper before this Court, as the only question properly that should be considered here is the question as to the constitutionality of the Montana statute, and the facts and record which would support the Solicitor General's position as to manifest necessity.

However, Bretz must dispute certain statements made in the Solicitor General's memorandum, so that his position can be understood.

There was in fact below but one criminal offense, which the State elected to attempt to charge in nine separate counts. This is proven by the fact that the second trial court finally permitted only one count to go to the jury.

The ninth count was not dismissed because of a repeal by the recent Montana Penal Code revision, but because the statute on which it had been predicated had been repealed long before that.

There is nothing in the record that reflects that Bretz withheld raising any issues pending the attachment of jeopardy, and in fact there are numerous references in briefs raising the point by Bretz that certain of these matters should be determined and resolved by the Court prior to the time jeopardy would attach. Specifically Bretz's counsel raised the point that the Court should grant his motions to dismiss, so that all of these questions could be taken by the State to the Montana Supreme Court prior to the time that jeopardy attached, and then be resolved by that court prior to trial.

Bretz's motion to restrict the factual proof to the period of time set forth in the information related to the fact and to a contention by Bretz that the particular crime involved did properly take place within the time frame set forth in that information, and related to the conclusion of the claim made to the Workmen's Compensation Board in Montana, by the filing of papers with that Board and the attaining of the funds at that time, and that proof and facts prior to that time were not proper.

Both sides applied to the Montana Supreme Court for supervisory control relief, and argued for the same which was there denied by the court.

The three counts were dismissed by the trial court, *sua sponte,* and over the specific objections by Bretz, which also included his specific statement that he was not waiving any rights he had thereto.

These facts, which are correct and are reflected by the record below, militate against, and destroy the factual position on which the Solicitor General's brief relies.

ARGUMENT

A. Is the Montana Statute that Jeopardy does not Attach until After the First Witness is Sworn Unconstitutional?

Bretz contends that the first two questions raised can properly be considered together and as stated above. This Montana statutory attempt to define when jeopardy attaches is unconstitutional under both the United States and Montana Constitutions. The Montana Legislature does not have the power to change the Constitution as interpreted by this Court.

Prior to 1969, *Palko v. Connecticut,* 302 U.S. 319, 87 L. Ed. 288, 58 S. Ct. 149 (1937) was the law of the land holding that the Fifth Amendment double jeopardy provision did not apply to the states, and they were free to then adopt their own rules thereon. Thus, in 1962 a Model Penal Code provision was proposed which

provided that jeopardy did not attach until the first witness was sworn. Montana adopted this provision in 1973 as the statute now in question. Thus, the 1964 Harvard Law Review cited in appellant's brief at page 10, the law from which is now out of date, this article did correctly predict *Benton,* below.

However, all this was changed in 1969 when *Palko* was specifically overruled in *Benton v. Maryland,* 395 U.S. 784, 23 L. Ed. 2d 707, 89 S. Ct. (1969), holding that:

> "The double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the states through the Fourteenth Amendment. Insofar as it is inconsistent with this holding, Palko v. Connecticut is overruled.
>
> "Palko represented an approach to basic constitutional rights which this Court's recent decisions have rejected. It was cut of the same cloth as Betts v. Brady, 316 U.S. 455, 86 L. Ed. 1595, 62 S. Ct. 1252 (1942), the case which held that a criminal defendant's right to counsel was to be determined by deciding in each case whether the denial of that right was 'shocking to the universal sense of justice'. Id., at 462, 86 L. Ed. at 1602. It relied upon Twining v. New Jersey, 211 U.S. 78, 53 L. Ed. 97, 29 S. Ct. 14 (1908) which held that the right against compulsory self-incrimination was not an element of Fourteenth Amendment due process. Betts was overruled by Gideon v. Wainwright, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792, 93 ALR.2d 733 (1963); Twining, by Malloy v. Hogan, 378 U.S. 1, 12 L. Ed. 2d 653, 84 S. Ct. 1489 (1964). Our recent cases have thoroughly rejected the Palko notion that basic constitutional rights can be denied by the States as long as the totality of the circumstances does not disclose a denial of 'fundamental fairness'. Once it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice', Duncan v. Louisiana, supra, at 149, 20 L. Ed. 2d at 496, the same constitutional standards apply against both the State and Federal Governments. Palko's roots had thus been cut away years ago. We today only recognize the inevitable."

During argument in the cases below, appellant has conceded that *Benton* applies to Montana, but the argument has been made that this Court's holding that Fifth Amendment jeopardy attaches

when the jury has been empanelled and sworn does not apply to Montana until this Court specifically so holds. The Montana Supreme Court so held in *State v. Sheriff, et al,* 539 P.2d 1191 (1975), at page 1192, saying:

> ". . . in the absence of a definite ruling by the United States Supreme Court . . ."

which was Bretz's first appearance before that Court on this issue, and again in affirming Bretz's conviction on appeal in *State v. Cline, et al,* 555 P.2d 724 at page 735, saying:

> ". . . until this issue is finally resolved by a contrary decision of a higher federal appeals court . . ."

Bretz understands that appellant also concedes that the United States Supreme Court and all of the federal courts unanimously hold and agree that jeopardy attaches in all federal courts when the jury is empanelled and sworn. This ruling and the reasons therefore were just recently again set forth by this Court in *U.S. v. Martin Linen Supply Co.*, ____ U.S. ____, 51 L. Ed. 2d 642 (decided April 4, 1977), at page 649:

> " 'The development of the Double Jeopardy Clause from its common-law origins . . . suggests that it was directed at the threat of multiple prosecutions, not at Government appeals, at least where those appeals would not require a new trial.' Id., at 342, 43 L. Ed. 2d 232, 95 S. Ct. 1013. Thus Wilson held that the 'controlling constitutional principle' focuses on prohibitions against multiple trials. Id., at 346, 43 L. Ed. 2d 232, 95 S. Ct. 1013. At the heart of this policy is the concern that permitting the sovereign freely to subject the citizen to a second trial for the same offense would arm government with a potent instrument of oppression. The Clause, therefore, guarantees that the State shall not be permitted to make repeated attempts to convict the accused, 'thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty.' Green v. United States, 355 U.S. 184, 187-188, 2 L. Ed. 2d 199, 78 S. Ct. 221, 77 Ohio L. Abs. 202, 61 ALR.2d 1119 (1957); see also Downum v. United States, 372 U.S. 734, 736, 10 L. Ed. 2d 100, 83 S. Ct. 1033

> (1963). '(S)ociety's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws.' United States v. Jorn, 400 U.S. 470, 479, 27 L. Ed. 2d 543, 91 S. Ct. 547 (1971) (Harlan, J.).
>
> "In animating this prohibition against multiple prosecutions, the Double Jeopardy Clause rests upon two threshold conditions. The protections afforded by the Clause are implicated only when the accused has actually been placed in jeopardy. Serfass v. United States, 420 U.S. 377, 43 L. Ed. 2d 265, 95 S. Ct. 1055 (1975). This state of jeopardy attaches when a jury is empanelled and sworn, or, in a bench trial, when the judge begins to receive evidence. Illinois v. Somerville, 410 U.S. 458, 471, 35 L. Ed. 2d 425, 93 S. Ct. 1066 (1973) (White, J., dissenting); Downum v. United States, supra."

This Court has recently heard and decided numerous cases involving jeopardy. However, these cases have principally arisen because of questions raised as to the government's right of appeal, which is now only restricted by this double jeopardy prohibition. This is truly the only concern of the Solicitor General's memorandum as filed herein, which is yet another illustration as to why such memorandum is not proper here. This appeal relates solely as to whether Bretz should have been subjected to a second prosecution after he had once been placed in jeopardy on the same charge. This constitutional guarantee is against being twice put to trial for the same offense as held in *Ex parte Lange,* 18 Wall. 163, 169, 21 L. Ed. 872 (1874) "the common law not only prohibited a second punishment for the same offense, but it went further and forbid a second trial for the same offense, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted."

This question was recently determined by this Court in *Adney v. United States,* ____ U.S. ____, 52 L. Ed. 2d 651, 97 S. Ct. ____, (decided June 9, 1977) as follows:

"Finally, the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence. To be sure, the Double Jeopardy Clause protects an individual against being twice convicted for the same crime, and that aspect of the right can be fully vindicated on an appeal following final judgment, as the Government suggests. However, this Court has long recognized that the Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to *trial* for the same offense.

" ' "The Constitution of the United States, in the Fifth Amendment, declares, 'nor shall any person be subject (for the same offense) to be twice put in jeopardy of life or limb.' The prohibition is not against being twice punished, but against being twice *put* in jeopardy . . . " . . . The "twice put in jeopardy" language of the Constitution thus relates to a potential, i.e., the risk that an accused for a second time will be convicted of the "same offense" for which he was initially tried.' Price v. Georgia, 398 U.S. 323, 326, 26 L.Ed.2d 300, 90 S. Ct. 1757 (1970).

"See also United States v. Jorn, 400 U.S. 470, 479, 27 L. Ed. 2d 543, 91 S. Ct. 547 (1971); Green v. United States, 355 U.S. 184, 187-188, 2 L. Ed. 2d 199, 78 S. Ct. 221, 77 Ohio L. Abs. 202, 61 ALR.2d 1119 (1957); United States v. Ball, 163 U.S. 662, 669, 41 L. Ed. 300, 16 S. Ct. 1192 (1896). Because of this focus on the 'risk' of conviction, the guarantee against double jeopardy assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense. It thus protects interests wholly unrelated to the propriety of any subsequent conviction. Justice Black aptly described the purpose of the clause:

" 'The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.' Green, supra, at 187-188, 2 L. Ed. 2d 199, 78 S. Ct. 221, 7 Ohio L. Abs. 202, 61 ALR.2d 1119.

"Accord, Breen v. Jones, 421 U.S. 519, 529-530, 44 L. Ed. 2d 346, 95 S. Ct. 1779 (1975); Serfass v. United States, 420 U.S. 377, 387-388, 43 L. Ed. 2d 265, 95 S. Ct. 1055 (1975); Jorn, supra, at 479, 27 L. Ed. 2d 543, 91 S. Ct. 547."

The facts raise a simple issue. In Bretz's first case, the jury was duly empanelled and sworn. The case thereafter was dismissed on motion of the State without his consent and over his objections that he was entitled to have the case tried before the jury then empanelled and sworn. Even though three counts had been dismissed by the trial court, *sua sponte*, there were still then five counts remaining. The position adopted by the State was that the Montana statute, *95-1711, R.C.M. 1947*, providing that jeopardy does not attach until after the first witness is sworn can change the constitutional double jeopardy clause and that jeopardy had not attached. The State filed the new information, and over Bretz's unsuccessful objections on the grounds of double jeopardy, he was tried, convicted and imprisoned. It is Bretz's position that under both the United States and Montana Constitutional provisions that jeopardy properly attached when the jury is empanelled and sworn and the Montana Statute is unconstitutional.

Thus, the question in this case is simply whether this Montana Statute is constitutional in view of the Fifth Amendment to the United States Constitution and the Montana Constitution, Article II, Section 25.

There are no cases by the Supreme Court of the United States which depart from this rule that jeopardy attaches when the jury is empanelled and sworn and this constitutional standard under "the law of the land" is thus established.

In the federal courts in Montana, the rule is the same. In *U.S. v. LeMay*, 330 F. Supp. 628, the court ruled that jeopardy attaches when a jury is empanelled and sworn, citing *Wade v. Hunter*, 336 U.S. 684, 93 L. Ed. 974, 69 S. Ct. 834. In 1971, the Honorable W.J. Jameson held in *U.S. v. Minyard*, quoting *22 C.J.S. 637, Criminal Law Section 241*, that jeopardy attaches when a jury is

empanelled and sworn. This is also the rule in the Ninth Circuit. See *Himmelfarb v. U.S.*, 175 F.2d 924, and *Howard v. U.S.*, 372 F.2d 294.

In Montana, under the 1889 constitutional clause, identical to the present clause in the 1972 Constitution, the highest court of Montana ruled to the same effect in *State v. Gaimos*, 162 Pac. 156, 53 Mont. 118.

The text authorities are no less explicit. See *Wharton's Criminal Evidence*, page 396; *22 C.J.S. Criminal Law 241; 15 Am. Jur. Criminal Law 40.*

In *Ex parte Bornee*, 76 W. Va. 360, 85 S.E. 529, the court said:

> "The West Virginia constitutional amendment of 1870-80, having for its purpose the revision of the judicial department, did not, wherein it provided that the supreme court should have 'such other appellate jurisdiction in both civil and criminal cases as may be prescribed by law,' give legislative power to alter the originally understood meaning of jeopardy in the Bill of Rights."

In *Booker v. Phillips*, 418 F.2d 434 (Kan. 1969), the court said:

> "Accordingly, it is now clear that the validity of the Appellate's conviction *must be judged* under the Federal double jeopardy standards." (Emphasis supplied.)

To the same effect is *Klinefelter v. Superior Court*, 502 P.2d 531 (Cal.).

In *Baker v. State*, 289 A.2d 348, (Md. 1972), the court said:

> "In state prosecutions as in federal prosecutions, double jeopardy must be applied in accordance with the Supreme Court's Constitutional construction and interpretations, from time to time of the Fifth Amendment Clause."

In *Bernard v. State*, 481 S.W.2d 427 (Tex. 1972), the court applied the rule and the standard adopted by the Supreme Court of the United States, even though there was a state statute that a higher prosecution was no bar if the proceeding was a misdemeanor.

Then there is the case of *People v. Scott*, 337 N.Y.S.2d 640 (1972).

"Appellant was convicted of criminally selling a dangerous drug in the third degree. His guilt was established beyond a reasonable doubt and we find no error during the trial to warrant a reversal. It is necessary, however, to discuss the appellant's motion to dismiss the indictment on the ground that he was being subjected to double jeopardy. On December 1, 1971, after four jurors had been selected and sworn, the court granted People's motion for a mistrial on the ground that an indispensable witness was out of the state and would not be available for the trial. On January 3, 1972, when the case was again called for trial, appellant moved to dismiss the indictment on the ground that he was being subjected to double jeopardy, contending that the trial had commenced by the previous selection of four jurors. In support of that claim, appellant relied on section 260.30 of the Criminal Procedure Law which, in prescribing the order in which a jury shall proceed, provides: '1. The jury must be selected and sworn.' However, in view of other sections of the Criminal Procedure Law directed specifically to the subject of double jeopardy, we think the section relied on by appellant is neither relevant nor determinative. Prior to the adoption of the Criminal Procedure Law, the traditional double jeopardy rule in New York was that a person was not placed in jeopardy until the jury had been examined and sworn and evidence given (Matter of Bland v. Supreme Court, 20 N.Y.2d 552, 554, 285 N.Y.S.2d 597, 598, 232 N.E.2d 633, 634.) The new criminal procedure statute, effective September 1, 1971, includes section 40.20, which provides that a person may not be twice prosecuted for the same offense. (N.Y. Const., Art. I, Section 6). By way of implementation of this provision, Section 40.30, subd. 1(b) states that a person 'is prosecuted' for an offense within the meaning of section 40.20, when the action proceeds to the trial state and a witness is sworn. By this provision it is clear that, under the Criminal Procedure law, jeopardy attaches, not on the selection and swearing of the jury as described in section 260.30, but on the subsequent swearing of a witness, as provided in section 40.30. There is another consideration which must be borne in mind in resolving a claim of double jeopardy. Under Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056, 23 U.S. 734, 83 S. Ct. 1033, 10 L. Ed. 2d 100, holding that jeopardy attaches when a jury has been impaneled and sworn, is now applicable to state prose-

cutions. In Benton the court found at page 794, 89 S. Ct. at page 2062, 'that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage and that it should apply to the state through the Fourteenth Amendment.' In view of these decisions, Criminal Procedure Law 40.30 should be amended to comply with the rule of Downum."

The rationale for jeopardy attaching at this point is well discussed in *Smith v. State of Mississippi*, 478 F.2d 88 at page 93:

"The respondent's contention that petitioner was not 'put to trial' or was in no way prejudiced by the dismissal of the proceedings before testimony was presented has been decided adversely to it by the Supreme Court in Downum v. United States, 372 U.S. 734, 10 L. Ed. 2d 100, 83 S. Ct. 1033 (1963), and recently reaffirmed in Illinois v. Somerville, 410 U.S. 458, 35 L. Ed. 2d 425, 93 S. Ct. 1066 (1973). In both cases the Supreme Court held that jeopardy attached when the first jury was selected and sworn. The mere introduction of evidence has no spontaneous effect on a defendant which can be said to automatically charge him with an appreciable degree of insecurity once he has made the preparations for trial and selected those of his peers who will determine his fate."

All trial lawyers recognize that their pre-trial preparations must be long completed and that they are all the way in the water by the time the jury has been selected.

In *McNeal v. Hollowell*, 481 F.2d 1145 (1973), the court stated as follows:

"The law regarding double jeopardy has recently been carefully reviewed and explained by the Supreme Court in Illinois v. Somerville, 1973, 410 U.S. 458, 93 S. Ct. 1066, 35 L. Ed. 2d 425, and by this Court in Smith v. Mississippi, 5 Cir. 1973, 478 F.2d 88. Therefore, with reference to these two cases we refrain from treating in extenso all of the principles and policies inherent in the theory of double jeopardy and instead direct our attention to the particular factors which have a bearing on the resolution of the issue before us.

"(1) The Fifth Amendment's proscription against placing a person in jeopardy twice for the same offense has been applied to the states through the Due Process Clause of the Fourteenth Amendment and this application must be made retroactively. Benton v. Maryland, 1969, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707, see Price v. Georgia, 1970, 398 U.S. 323, 331 N. 9, 90 S. Ct. 1747, 25 L. Ed. 2d 300; Ashe v. Swenson, 1970, 397 U.S. 436, 437, N. 1, 90 S. Ct. 1189, 25 L. Ed. 2d 469; Waller v. Florida, 1970, 397 U.S. 387, 391, n. 2, 90 S. Ct. 1184, 25 L. Ed. 2d 435; North Carolina v. Pearce, 1969, 395 U.S. 711, 89 S. Ct. 2082, 23 L. Ed. 2d 656; Galloway v. Beto, 5 Cir. 1970, 421 F.2d 284, cert. den. 400 U.S. 912, 91 S. Ct. 137, 27 L. Ed. 2d 251.

"(2) Because '(t)he prohibition is not against being twice punished, but against being twice put in jeopardy,' United States v. Gall, 1896, 183 U.S. 662, 669, 16 S. Ct. 1192, 1194, 41 L. Ed. 300, it is necessary to determine when jeopardy attaches in a jury trial. In Downum v. United States, 1963, 372 U.S. 734, 83 S. Ct. 1033, 10 L. Ed. 2d 100, the Supreme Court recognized that this occurs when the jury is impaneled and sworn, thus vesting the defendant with the valued right to have his trial completed before that tribunal and that jury. See Wade v. Hunter, 1949, 336 U.S. 684, 689, 69 S. Ct. 834, 93 L. Ed. 974."

See also *Curry v. Superior Court of the City and County of San Francisco*, 87 Cal. Rep. 361, 470 P.2d 345 (1970), wherein the Supreme Court of California was construing Article I, Section 13 of the California Constitution which states "No person shall be *twice put in jeopardy for the same offense* ..." The Court in *Curry* construed this section as follows:

"Article I, section 13, of the California Constitution declares that 'No person shall be twice put in jeopardy for the same offense ***.' Implementing this constitutional command, the decisions of this court have settled the now familiar rules that (1) jeopardy attaches when a defendant is placed on trial in the court of competent jurisdiction, on a valid accusatory pleading, before a jury duly impaneled and sworn, and (2) a discharge of that jury without a verdict is equivalent in law to an acquittal and bars a retrial, unless the defendant consented thereto or legal necessity required it. (Paulson v. Superior Court (1962) supra, 68 Cal.2d 1, 5, 22 Cal. Rep. 649, 372

P.2d 641; Cardenas v. Superior Court, (1961) 56 Cal.2d 273, 275, 14 Cal. Rep. 657, 363 P.2d 889; Jackson v. Superior Court (1937) 10 Cal.2d 350, 352-357, 74 P.2d 243, and cases cited; see also Pen. Code § § 654, 687, 1023, 1140, and 1141.)

"In the case at bar the record demonstrates that at the time the court declared a mistrial and discharged the jury, jeopardy had attached pursuant to the foregoing rules; the sole remaining issues, therefore, are consent and legal necessity.

"At no time did petitioner, in person or through counsel, expressly consent to the granting of the mistrial or the discharge of the jury. The People maintain that petitioners impliedly gave such consent, but the contention does not withstand analysis. When a trial court proposes to discharge a jury without legal necessity therefor, the defendant is under no duty to object in order to claim the protection of the constitutional guarantee, and his mere silence in the face of an ensuing discharge cannot be deemed a waiver."

If there was any question previously as to when jeopardy attaches in a jury case, the U.S. Supreme Court has just recently laid this question to rest. In *Serfass v. U.S.*, 420 U.S. 337 (1975), the question to be decided was the:

> "point in criminal proceedings at which the constitutional purposes and policies are implicated by resort to the concept of 'attachment of jeopardy.' "

and the Court held that:

> "In the case of a jury trial jeopardy attaches when a jury is empaneled and sworn."

In *Brown v. Ohio*, 45 L.W. 4697 (decided June 16, 1977), this Court reversed the Ohio court's determination that double jeopardy did not apply because joy riding and auto theft were claimed to be two separate offenses.

This position was also recognized in *Lee v. U.S.*, 45 L.W. 4661 (decided June 13, 1977), in Note 3 as follows:

> "As this was a bench trial, jeopardy did not attach until the court began to hear evidence. Serfass v. U.S., 420 U.S. 377, 388 (1975)."

The law as decided by this Court, by all federal court decisions we have located, and by every state court decision we have located, with the exception of Montana and possibly Arizona, all agree that jeopardy attaches when a jury is empanelled and sworn. This is a constitutional right, and Bretz respectfully contends that the State of Montana has no power to adopt a different standard. As a citizen of Montana, Bretz is entitled to the same constitutional protections he would have if present in any one of the other states. This Montana statute is unconstitutional.

B. The Solicitor General's Memorandum as *Amicus Curiae* is not proper and Should Not be Considered.

The Solicitor General's office was courteous in advising that his office intended to file a memorandum for the United States as *amicus curiae* so that Bretz was then able to secure an extension of time to file this brief and which permits him to reply to the Solicitor General's Memorandum received July 28, 1977. This memorandum takes "no position" on the first two questions presented as to the constitutionality of the Montana statute which states that jeopardy does not attach until after the first witness has been sworn, stating "We do not address the first — the time at which jeopardy attaches — because this Court's decision is not likely to affect the interests of the United States". (Sol. Gen. Mem. p. 1), and discusses only the third question presented by appellant, which is:

> "3. Assuming that this Court were to hold that jeopardy attaches in state proceedings when the jury is sworn, does the doctrine of 'manifest necessity' nevertheless require that a trial be held?"

Bretz objects to any consideration of such memorandum for the following reasons:

(1) As raised by appellee Cline's motion to dismiss or affirm, which was adopted by reference in appellee Bretz's motion to affirm, any question as to "manifest necessity" does not involve a state statute held by a court of appeals to be unconstitutional

which is one of the requirements of *28 U.S.C.A. 1254(2)*, the statute relied on by appellant for the jurisdiction of this Court for this direct appeal. This statute also requires that any such "review on appeal shall be restricted to the federal questions presented". This Court's practice is to strictly construe statutes authorizing appeals. *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 27 L.Ed.2d 174, 91 S. Ct. 156 (Puerto Rico, 1970).

(2) Any question as to manifest necessity was never presented to or ruled upon by any state court in this action. This double jeopardy question was presented by Bretz to the State District Trial Court, the Montana Supreme Court by an application for a writ of habeas corpus, and finally by appeal to the Montana Supreme Court and in none of these did the State raise this issue. As noted on page 14 of appellant's brief, this question was not ruled upon by any of these State Courts and appeared for the first time in the Federal District Court decision.

(3) This third issue has been abandoned by the appellant. As shown by page 14 of appellant's brief, this issue appears to have been specifically abandoned by appellant and is not a proper subject for consideration here. Bretz agrees with the Solicitor General's statement that "their approach (appellant's) amounts to an abandonment of the question". If appellant has not specifically abandoned the same, this issue has been foreclosed by their failure to brief the same. Supreme Court Rule 40.,1.,(g) requires that the brief contain "The argument, exhibiting clearly the points of fact and of law being presented, citing the authorities and statutes relied upon". Only errors assigned will be considered. *U.S. v. Crescent Amusement Co.*, 323 U.S. 173, 89 L.Ed. 160, 655 S. Ct. 254 (Tenn. 1944), rehearing denied, 323 U.S. 818, 89 L.Ed. 650, 65 S. Ct. 734, and matters not argued need not be considered. *I.T.S. Rubber Co. v. Essex Rubber Co.*, 272 U.S. 429, 71 L.Ed. 355, 45 S. Ct. 136 (Mass. 1926). In the *New Haven Inclusion Cases*, 399 U.S. note 78 at page 481, 392, 26 L.Ed.2d 691, 90 S. Ct. 2065, this Court held that "The Committee has not revived the issue in its brief, nor has it responded in its reply brief to the government's contention that it has abandoned the claim. Accordingly, we do not consider

the matter further".

(4) The record does not contain a transcript of the State Court proceedings nor the principal portion of the pleadings therein, and the Solicitor General's Memorandum contains erroneous assumptions of facts thereon. See certain of these errors pointed out below. Bretz agrees with the Solicitor General's statement on this that "the record in this case appears to be inadequate to permit consideration . . ."

(5) *Amicus curiae* must take the case as it is and cannot expand on the issues presented to the Court. He is not a party to the action. *Court v. Sanduski*, C.A.. Ill. 206 F.2d 915; *Alexander v. Hall*, D.C.S.C., 64 F.R.D. 152. He cannot assume the functions of a party. *Kemp v. Rubin*, 64 N.Y.S.2d 510, 187 Misc. 707. He cannot take upon himself the management of the action as counsel, and has no control over the proceedings. *State ex rel Bennett v. Bonner*, 214 P.2d 747, 123 Mont. 414. He takes the case as he finds it, with the issues made by the parties, and cannot raise separate issues. *State ex rel Kvallen v. Graybill*, 496 P.2d 1127, ___ Mont. ___ . *Anderson v. Smith*, 148 So. 2d 243 (Ala.) holds that where an appellant waived an assignment of error, the same could not be injected into a Supreme Court review of that case by any action on the part of *amicus curiae*. *Amicus curiae* has no right to create, extend or enlarge issues. *City of Tempe v. Prudential Ins. Co. of America*, 510 P.2d 745, 109 Ariz. 429, app. dism., 414 U.S. 1088, 38 L.Ed.2d 546, 94 S. Ct. 717.

C. Manifest Necessity does not Allow a Second Trial After Jeopardy had Properly Attached.

As noted above, Bretz contends that this question is not properly before the Court, and the Solicitor General's Memorandum should not be considered thereon.

A leading United States Supreme Court decision on this point is *Illinois v. Somerville*, 410 U.S. 458, 93 S. Ct. 1066, 35 L.Ed.2d 425. The basis for those certain recognized exceptions

to this general rule are ably discussed beginning at page 1069 of 93 S. Ct.

"The fountainhead decision construing the Double Jeopardy Clause in the context of a declaration of a mistrial over a defendant's objections is United States v. Perez, 9 Wheat. 579 (1824). Mr. Justice Story, writing for a unanimous Court, set forth the standards for determining whether a retrial, following a declaration of a mistrial over a defendant's objection, constitutes double jeopardy within the meaning of the Fifth Amendment. In holding that the failure of the jury to agree on a verdict of either acquittal or conviction did not bar retrial of the defendant. Mr. Justice Story wrote:

" 'We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office.' Id., at 580.

"This formulation, consistently adhered to by this Court in subsequent decisions, abjures the application of any mechanical formula by which to judge the propriety of declaring a mistrial in the varying and often unique situations arising during the course of a criminal trial. The broad discretion reserved to the trial judge in such circumstances has been consistently reiterated in decisions of this Court. In Wade v. Hunter, 336 U.S. 684, 69 S. Ct. 834, 93 L.Ed. 974 (1949), the Court, in reaffirming this flexible standard, wrote:

" 'We are asked to adopt the Cornero (v. United States, 48 F.2d 69) rule under which petitioner contends the absence of witnesses can never justify discontinuance of a trial. Such a rigid formula is inconsistent with the guiding principles of the Perez decision to which we adhere. Those principles command courts in considering whether a trial should be terminated without judgment to take "all circumstances into account" and thereby forbid the mechanical application of an abstract formula. The value of the Perez principles thus lies in their capacity for informed application under widely different circumstances, without injury to defendants or to the public interest.' Id., at 691, 69 S. Ct. at 838.

"Similarly in Gori v. United States, 367 U.S. 364, 81 S. Ct. 1523, 6 L.Ed.2d 901 (1961), the Court again underscored the breadth of a trial judge's discretion, and the reasons therefor, to declare a mistrial.

" 'Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's injections, and he may be retried consistently with the Fifth Amendment.' Id., at 368, 81 S. Ct., at 1526.

"In reviewing the propriety of the trial judge's exercise of his discretion, this Court, following the counsel of Mr. Justice Story, has scrutinized the action to determine whether, in the context of that particular trial, the declaration of a mistrial was dictated by 'manifest necessity' or the 'ends of public justice'. The interests of the public in seeing that a criminal prosecution proceed to verdict, either of acquittal or conviction, need not be forsaken by the formulation or application of rigid rules that necessarily preclude the vindication of that interest. This consideration, whether termed the 'ends of public justice,' United States v. Perez, supra, at 580 of 22 U.S. or, more precisely, 'the public's interest in fair trials designed to end in just judgments,' Wade v. Hunter, supra, at 689 of 336 S. Ct. has not been disregarded by this Court.

"In United States v. Perez, supra, and in Logan v. United States, 144 U.S. 263, 12 S. Ct. 617, 36 L.Ed. 429 (1892), this Court held that 'manifest necessity' justified the discharge of juries unable to reason verdict, and, therefore,

the Double Jeopardy Clause did not bar retrial. Cf. Keerl v. Montana, 213 U.S. 135, 29 S. Ct. 469, 53 L.Ed. 734 (1909); Dreyer v. Illinois, 187 U.S. 71, 23 S. Ct. 28, 47 L.Ed. 79 (1902). In Simmons v. United States, 142 U.S. 148, 12 S. Ct. 171, 35 L.Ed. 968 (1891), a trial judge dismissed the jury, over defendant's objections, because one of the jurors had been acquainted with the defendant, and, therefore, was probably prejudiced against the Government; this Court held that the trial judge properly exercised his power 'to prevent the defeat of the ends of public justice.' Id., at 154, 12 S. Ct., at 172. In Thompson v. United States, 155 U.S. 271, 15 S. Ct. 73, 39 L.Ed. 146 (1894), a mistrial was declared after the trial judge learned that one of the jurors was disqualified, he having been a member of the grand jury that indicted the defendant. Similarly, in Lovato v. New Mexico, 242 U.S. 199, 37 S. Ct. 107, 61 L.Ed. 244 (1916), the defendant demurred to the indictment, his demurrer was overruled, and a jury sworn. The district attorney, realizing that the defendant had not pleaded to the indictment after the demurrer had been overruled, moved for the discharge of the jury and arraignment of the defendant for pleading; the jury was discharged, the defendant pleaded not guilty, the same jury was again impaneled, and a verdict of guilty rendered. In both of those cases this Court held that the Double Jeopardy Clause did not bar reprosecution.

"(2) While virtually all of the cases turn on the particular facts and thus escape meaningful categorization, see Gori v. United States, supra; Wade v. Hunter, supra, it is possible to distill from them a general approach, premised on the 'public justice' policy enunciated in United States v. Perez, to situations such as that presented by this case. A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial. If an error would make reversal on appeal a certainty, it would not serve 'the ends of public justice' to require that the Government proceed with its proof when, if it succeeded before the jury, it would automatically be stripped of that success by an appellate court. This was substantially the situation in both Thompson v. United States, supra, and

Lovato v. New Mexico, supra. While the declaration of a mistrial on the basis of a rule or a defective procedure that would lend itself to prosecutorial manipulation would involve an entirely different question, cf. Downum v. United States, supra, such was not the situation in the above cases or in the instant case.

"In Downum v. United States, the defendant was charged with six counts of mail theft, and forging and uttering stolen checks. A jury was selected and sworn in the morning, and instructed to return that afternoon. When the jury returned, the Government moved for the discharge of the jury on the ground that a key prosecution witness, for two of the six counts against defendant, was not present. The prosecution knew, prior to the selection and swearing of the jury, that this witness could not be found and had not been served with a subpoena. The trial judge discharged the jury over the defendant's motions to dismiss two counts for failure to prosecute and to continue the other four. This Court, in reversing the convictions on the ground of double jeopardy, emphasized that '(e)ach case must turn on its facts,' 372 U.S., at 737, 83 S. Ct., at 1035 and held that the second prosecution constituted double jeopardy, because the absence of the witness and the reason therefor did not there justify, in terms of 'manifest necessity', the declaration of a mistrial.

"In United States v. Jorn, supra, the Government called a taxpayer witness in a prosecution for willfully assisting in the preparation of fraudulent income tax returns. Prior to his testimony, defense counsel suggested he be warned of his constitutional right against compulsory self-incrimination. The trial judge warned him of his rights, and the witness stated that he was willing to testify and that the Internal Revenue Service agent who first contacted him warned him of his rights. The trial judge, however, did not believe the witness' declaration that the IRS had so warned him, and refused to allow him to testify until after he had consulted with an attorney. After learning from the Government that the remaining four witnesses were 'similarly situated', and after surmising that they, too, had not been properly informed of their rights, the trial judge declared a mistrial to give the witnesses the opportunity to consult with attorneys. In sustaining a plea in bar of double

jeopardy to an attempted second trial of the defendant, the plurality opinion of the Court, emphasizing the importance to the defendant of proceeding before the first jury sworn, concluded:

" 'It is apparent from the record that no consideration was given to the possibility of a trial continuance; indeed, the trial judge acted too abruptly in discharging the jury that, had the prosecutor been disposed to suggest a continuance, or the defendant to object to the discharge of the jury, there would have been no opportunity to do so. When one examines the circumstances surrounding the discharge of this jury, it seems abundantly apparent that the trial judge made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was manifest necessity for the sua sponte declaration of this mistrial. United States v. Perez, 9 Wheat., at 580. Therefore, we must conclude that in the circumstances of this case, appellee's reprosecution would violate the double jeopardy provision of the Fifth Amendment.' 400 U.S., at 487, 91 S. Ct., at 558.' "

A 1971 Montana Federal District Court case, *U.S. v. LeMay*, 330 F. Supp. 628, has striking similarities, and we quote from this decision at length:

"If an indictment is sufficient to support a conviction, jeopardy is held to attach when a jury is impaneled and sworn. Crawford v. United States, 109 U.S. App. D.C., 219, 285 F.2d 661, (1960), citing Wade v. Hunter, 336 U.S. 684, 69 S. Ct. 834, 93 L.Ed. 974 (1940). There are, however, exceptions to this general rule. In United States v. Perez, 9 Wheat. 479, 22 U.S. 579, 6 L.Ed. 165 (1824), the Supreme Court of the United States held that discharge of the jury after they were unable to reach a verdict did not bar a future trial for the same offense. In Wade v. Hunter, supra, the Court relying on the Perez decision held that the double jeopardy provision of the Fifth Amendment did not require that a defendant be permitted to go free in every case in which a trial failed to end in a final judgment. The Court cited the Perez language, which indicated that, if a manifest necessity for dismissal of the jury prior to a final verdict existed, there would be no bar to a future trial for the same offense.

"The manifest necessity for dismissal of the jury without a verdict was found in Brock v. North Carolina, 344 U.S. 424, 73 S. Ct. 439, 97 L.Ed. 456 (1953), in the refusal of the state's witnesses to testify against the defendant. In affirming the trial court's denial of the defendant's plea of double jeopardy, the Court said:

" 'This court has long favored the rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will best be served.' Brock, at 427, 73 S. Ct. 349, at 350.

"In United States v. Chase, 372 F.2d 453 (4th Cir. 1967), the defendant moved for a mistrial on the basis of jury prejudice from a newspaper article found in the jury room. A new trial was granted and one of the jury-trial defendants moved for dismissal on the basis of double jeopardy. Another of the jury-trial defendants did not move for a mistrial and neither of the non-jury trial defendants asked for severance of the case. The Court there found a necessity in dismissing the case as to all of the defendants, both jury and non-jury, because of the effect on the defendants on a jury trial of any decisions rendered as to the defendants on the non-jury trial.

"The finding of a manifest necessity is not automatic, however. In Cornero v. United States, 48 F.2d 69 (9th Cir. 1931), the United States Attorney failed to have his witnesses present for the trial. The court dismissed the jury and a new jury was later impaneled for trial. The defendant thereupon pleaded that he was placed in double jeopardy. The Ninth Circuit recognized that jeopardy attaches when the jury is impaneled, with certain exceptions. It denied the Government's claim that this particular case fell within those exceptions.

"The Court, relying on the fact that the District Attorney had suggested the impaneling of the jury, knowing that his witnesses were not present, said:

" 'We are here dealing, however, with a fundamental right of a person accused of crime, guaranteed to him by the Constitution, and such right cannot be frittered away or abridged by general rules concerning the importance of advancing public justice * * * (N)o court has gone to the extent of holding that, after the impanelment of the jury for

the trial of a criminal case, the failure of the district attorney to have present sufficient witnesses, or evidence to prove the offenses charged, is an exception to the rule that the discharge of a jury after its impanelment for the trial of a criminal case operates as a protection against a retrial of the same cause.' Cornero, at 71.

"The Supreme Court in Downum v. United States, 372 U.S. 734, 83 S. Ct. 1033, 10 L.Ed.2d 100 (1963), upheld the ruling of the Ninth Circuit Court of Appeals in the Cornero case, quoting the above language in its opinion. In view of this precedent, the issue to be resolved in the instant case is whether there existed a manifest necessity, within the meaning of Wade, for dismissal of the jury or whether the case falls within the confines of Downum and Cornero.

"Three factors weigh heavily in deciding this issue. The United States Attorney drew the indictment and should have known the offense occurred in Brockton and not Poplar. The United States Attorney could have dismissed the indictment and obtained a correct indictment before the jury was impaneled and sworn, without any prejudice to his case. United States v. Kimbrew, 380 F.2d 538 (6th Cir. 1967). The first indictment would have supported a conviction if the United States Attorney had proceeded with his case, since the verdict would have cured the variance and the variance would not have been misleading to the defendant. Ledbetter v. United States, supra; United States v. Ansani, supra.

"When these facts are considered, the theory of the United States Supreme Court in United States v. Jorn, 400 U.S. 470, 91 S. Ct. 547, 27 L.Ed.2d 543 (1971), must be considered in determining whether a manifest necessity existed for dismissal of the jury without a verdict. In that case, the Court held that in the absence of a motion for dismissal by defendant the rule of Perez is a

"' • • • command to trial judges not to foreclose the defendant's option (to have the original jury decide his fate) until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings.' Jorn, at 485, 91 S. Ct. at 557.

"The Court distinguished the actions of the trial court in Jorn from those of the trial court in Gori v. United States, 367 U.S. 364, 81 S. Ct. 1523, 6 L.Ed.2d 901 (1961). In Gori, the trial court was held to have acted within its discretion in stopping the trial when it appeared to it that the prosecution's improper questioning would seriously prejudice defendant. In Jorn, on the other hand, the trial court dismissed the jury so that government witnesses could confer with their attorneys before answering more questions, even though the prosecution advised the court that the witnesses had been fully advised of their right to refuse to testify where their answers would be self-incriminating. The trial court then dismissed a subsequent information against the same defendants because of former jeopardy.

"In comparing the facts of Jorn with those of Gori, the Court found that under any circumstances the action of the trial court in Jorn was not taken for the benefit of the defendant, as it had been in Gori. Therefore, the ruling in Gori was not controlling.

"In regard to the issue of abuse of discretion by the trial court, the Jorn Court said:

" 'Reprosecution after a mistrial has unnecessarily been declared by the trial court obviously subjects the defendant to the same personal strain and insecurity regardless of the motivation underlying the trial judge's action.' Jorn, 400 U.S. at 483, 91 S. Ct. at 556.

"Finally, the Court concluded that the trial court abused its discretion in discharging the jury without the consent of the defendant and that his action was therefore a bar to further prosecution.

"In terms of the Gori decision, the dismissal of the first indictment in the instant case cannot be said to have been necessary to prevent an injustice. Gori, 367 U.S. at 368, 81 S. Ct. 1523, rather, it was done only after the United States Attorney announced that he was not ready to proceed. On the basis of the Supreme Court decisions, including Jorn, to allow the defendant a 'manifest necessity' must have existed for the dismissal. Unless that necessity existed, the Fifth Amendment prevents a trial on the new indictment.

"(5) As stated in Wade, there is no rigid rule to determine when former jeopardy will bar further prosecution. Each

case must be decided after a careful consideration of all its facts.

"(6) The facts that must be considered in this case prevent the finding of a manifest necessity. The error in the indictment was not misleading to the defendant and, since the whole record is available to defendant, a conviction would not have left her open to additional charges for the same offense. In addition, the Government, which originally drew the indictment, could have moved for dismissal of the indictment before the jury was sworn and impaneled without endangering prosecution on a corrected indictment issued by a grand jury.

"Thus, the government allowed two permissible alternatives for correcting the error in the indictment to go unused and chose the one method which was closed to it. Rather than showing a 'manifest necessity' for dismissal of the jury, these facts appear to bring the case within the Downum decision. As in Downum, the prosecution allowed the jury to be sworn with knowledge that it did not have a proper indictment and that the proof would be different from the facts charged.

"(7) If, however, the defendant can be said to have agreed to the dismissal of the jury, then she waived her right to claim double jeopardy on the second indictment. Green v. United States, 355 U.S. 184, 78 S. Ct. 221, 2 L.Ed.2d 199 (1957); Raslich v. Bannan, 273 F.2d 420 (6th Cir. 1959); Haugen v. United States, 153 F.2d 850 (9th Cir. 1946).

"In United States v. Armco Steel Corp., 252 F. Supp. 364 (S.C. Cal. 1966), the court held that the right of the defendant to not be placed in double jeopardy can be waived, but that it must be shown that there was an intentional relinquishment of a known right or privilege. Citing Himmelfarb v. United States, 175 F.2d 924 (9th Cir. 1949).

"In Himmelfarb, the Ninth Circuit Court of Appeals held that '(i)n the absence of express authority, an attorney has no power to surrender substantial legal rights of his client.' Himmelfarb at 931. The court went on to add that such consent should appear on the minutes and that the absence of rejection of the waiver does not preclude the defendant from pleading double jeopardy. See also, United States v.

El Rancho Adolphus Products, Inc., 140 F. Supp. 645 (M.D. Pa. 1956), aff. 3 Cir., 243 F.2d 367.

"A review of the record reveals that the defendant did not specifically waive her right to protection against double jeopardy and rather that her counsel specifically stated that he wished not to be considered as having made any proceedings which would waive the plea of double jeopardy.

"The motion by defendant to dismiss the original indictment was based on the failure of the Government to proceed with the case. The court granted the motion by the government to dismiss rather than the motion by the defendant. Therefore, the defendant cannot be said to have concurred in the dismissal of the jury without a verdict so as to have waived her right to plead double jeopardy to a later indictment on the same offense. Defendant's motion must be treated as a motion to dismiss for failure to prosecute.

"It is the opinion of the court, therefore, that the original indictment was sufficient to support a conviction on the proof which would have been offered, that the defendant would not have been misled nor placed in danger of conviction twice for the same offense, that there was not a manifest necessity for the motion of the United States to dismiss, so as to outweigh the guarantee of the Fifth Amendment against double jeopardy, and that the defendant did not concur in the motion of the United States to dismiss the indictment.

"It is therefore ordered and adjudged that the motion of the defendant is granted and the charges against her are dismissed."

The Solicitor General's memorandum relies on *Lee v. United States*, cited above, but this is based on an erroneous factual foundation. This citation from *Lee* at 45 L.W. 4663 supports Bretz's position:

"We conclude that the distinction between dismissals and mistrials has no significance in the circumstances here presented and that established double jeopardy principles governing the permissibility of retrial after a declaration of mistrial are fully applicable.

"When the District Court terminated the first trial in this case it did not act *sua sponte* but in response to a motion by

defense counsel. In *United States v. Dinitz*, we examined the permissibility of retrial in an analogous situation where the trial court had granted a defense motion for mistrial.

"In that case, after jeopardy had attached but well before verdict, the trial judge had excluded one of the defendant's lawyers from the courtroom for repeatedly disregarding his instructions. The defendant's remaining lawyer moved for a mistrial and the court granted the motion. The defendant was indicted again on the same charge, his double jeopardy claims were rejected, and he was convicted. When the double jeopardy issue reached this Court, we held that the defendant's second trial on the same charge did not violate the Fifth Amendment.

"Writing for the Court, Mr. Justice Stewart reiterated the rule that 'where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error.' *Id.*, at 607, quoting *United States v. Jorn*, 400 U.S., at 485 (plurality opinion). Recognizing that a prejudicial error committed by court or prosecutor generally presents the defendant with a 'Hobson's choice', Mr. Justice Stewart nevertheless stressed the importance of preserving the defendant's 'primary control over the course to be followed in the event of such error.' *Id.*, at 609.

" 'Even when judicial or prosecutorial error prejudices a defendant's prospects of securing an acquittal, he may nonetheless desire "to go to the first jury and, perhaps, end the dispute then and there with an acquittal". *United States v. Jorn, supra*, at 484. Out prior decisions recognize the defendant's right to pursue this course in the absence of circumstances of manifest necessity requiring a *sua sponte* judicial declaration of mistrial. But it is evident that when prejudicial or prosecutorial error seriously prejudices a defendant, he may have little interest in completing the trial and obtaining a verdict from the first jury. The defendant may reasonably conclude that a continuation followed by a lengthy appeal and, if a reversal is secured, by a second prosecution. In such circumstances, a defendant's mistrial request has objectives not unlike the interests served by the Double Jeopardy Clause — the avoidance of the anxiety,

expense, and delay occasioned by multiple prosecutions.' *Id.*, at 608.

"Where the defendant, by requesting a mistrial, exercised his choice in favor of terminating the trial, the Double Jeopardy Clause generally would not stand in the way of reprosecution . . ."

In this case below, one of the nine counts was dismissed by the State because the statute on which it had been based had been repealed long before. This dismissal was prior to the attachment of jeopardy. Then the Court, of its own motion, dismissed three counts. This left five counts on which a jury had been selected, empanelled and sworn, and on which the State had taken the position that it had sufficient evidence to convict, and that it was ready for trial. Over specific objections by Bretz, the State dismissed these counts, and over Bretz's specific position that he was then entitled to go to trial before this jury and on these counts. As noted in *Lee*, the defendant Bretz did not control the course of the action taken by the trial court, and in fact the opposite was true and the course was controlled entirely by the trial court and by the prosecution, and over his objections thereto.

In any event, manifest necessity is not properly found here.

CONCLUSION

The Montana statute is unconstitutional. Jeopardy attached when the jury was empanelled and sworn, and the second prosecution was barred by the Fifth Amendment Double Jeopardy Clause. Appellant has abandoned its third question presented as to manifest necessity and this should not be considered. As the *amicus curiae* memorandum by the Solicitor General relates only to this third question, the same is not proper and should not be considered.

Respectfully submitted,

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